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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 964

NED EDWARD HEITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

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THE JUDGE PRESS — SEATTLE, WASHINGTON

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In the

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NED EDWARD HETT, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent.*	No._____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

Ned Edward Hett prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on November 18, 1965.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 3a, is reported in F. 2d .

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 18, 1965 and is printed in Appendix C hereto, *infra* p. 11a. A Petition for Rehearing was timely filed on December 16, 1965. Rehearing was denied on January 3, 1966. Vol. 1, R. 41. The jurisdiction of this court is invoked under

Title 28, United States Code, Section 1254 (1) and Rule 22 (2).

III.

QUESTIONS PRESENTED

A. Whether an accused is denied the right to a fair trial under the Sixth Amendment to the Constitution of the United States by a trial court's refusal to strike the direct and re-direct testimony of the Government's chief witnesses when

(1) such testimony is the proof of one of the contested elements of the crime with which the accused is charged, and

(2) the witness has successfully invoked the privilege against self-incrimination and refused to answer germane questions on the same subject matter on cross and re-cross examination.[1]

B. Whether it is a crime against the United States under Title 18, United States Code, Section 1073, for a person charged with robbery in one state to travel in interstate or foreign commerce with intent to avoid prosecution for that robbery when the travel does not originate in the charging state and is not a part of a trip which originated in the charging state.

---

[1] The petitioner contends that the evidence admitted by the trial court on the contested element of the crime referred to in this question – namely, Richard James Young's intention in making the interstate and foreign travel – was insufficient to sustain petitioner's conviction. If this petition is granted, petitioner would like to present this issue for determination as a subsidiary and related question.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are Title 18, United States Code, Sections 2, 3, 4, and 1073. All are printed in Appendix A, *infra*, pp. 1a, 2a, with the exception of Title 18, United States Code, Section 1073, the printing of which follows:

§ 1073. *Flight to avoid prosecution or giving testimony.*

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated. (62 Stat. 683. As amended Apr. 6, 1956, c. 177 § 1, 70 Stat. 100; Oct. 4, 1961, Pub. L. 87-368, 75 Stat. 795)

V.

STATEMENT

The petitioner was indicted in the District Court of the United States for the Western District of Washington, Northern Division, on October 14, 1963. The accusation purported to allege two violations of Title 18, United States Code, Sections 1073 and 2; two violations of Title 18, United States Code, Section 4; and one violation of Title 18, United States Code, Sections 1073 and 3.

Jurisdiction was conferred upon the District Court under the provisions of Title 18, United States Code, Section 3231.

An essential element to each of the first two counts of the Indictment (as supplemented by the Bill of Particulars) was the accusation that on or about March 8, 1963, one Richard James Young committed a crime against the United States under the provisions of Title 18, United States Code, Section 1073, by travelling in interstate commerce from Bellevue, Washington to Oakland, California *with intent to avoid prosecution* in the State of Washington *for the crime of the December 1, 1962 robbery of a grocery store in Kirkland, Washington.* Petitioner was accused in Counts I and II as follows:

> COUNT I. On or about March 8, 1963, aiding, counselling and abetting said travel by Young, all in violation of Title 18, United States Code, Sections 1073 and 2.

COUNT II. On or about March 8, 1963, knowingly concealing and failing to report the specific crime which the petitioner, by Count I, was accused of aiding, all in violation of Title 18, United States Code, Section 4.

An essential element to each of the last three counts of the Indictment (as supplemented by the Bill of Particulars) was the accusation that on or about March 22, 1963, one Richard James Young committed a crime against the United States under the provisions of Title 18, United States Code, Section 1073, by travelling in foreign commerce from San Francisco, California to Rio de Janeiro, Brazil, *with intent to avoid prosecution in the State of Washington for the crime of the December 1, 1962 robbery of a grocery store in Kirkland, Washington.* In Counts III, IV and V, petitioner was accused as follows:

COUNT III. On or about March 22, 1963, aiding, counselling and abetting said travel by Young, all in violation of Title 18, United States Code, Sections 1073 and 2.

COUNT IV. On or about March 29, 1963, knowingly concealing and failing to report the specific crime which the petitioner, by Count III, was accused of aiding, all in violation of Title 18, United States Code, Section 4.

COUNT V. On or about March 29, 1963, knowing that Young had committed the specific crime which the petitioner, by Count III, was accused of aiding, the petitioner comforted and assisted Young in order to prevent and hinder his apprehension, trial and punishment, all in violation of Title 18, United States Code, Sections 1073 and 3.

The petitioner was tried by jury and acquitted of Count I and convicted of the remaining counts of the Indictment. Judgment and sentence was entered as follows:

COUNT II. Imprisonment for three years.

COUNT III. Imprisonment for five years and a fine of $5,000.

COUNT IV. Imprisonment for three years.

COUNT V. Imprisonment for two and one-half years.

The sentences on Counts II, IV and V were made concurrent with the sentence on Count III.

An appeal was taken to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgment and sentence of the District Court. In so doing, the Court of Appeals considered only those assignments of error which related to Count III because of the concurrent nature of the sentence on the other Counts. Appendix B hereto, *infra*, p. 5a.

The evidence at the trial established that on December 10, 1962 a State warrant was issued for the arrest of Richard James Young for a robbery which was alleged to have occurred December 1, 1962 at a grocery store in Kirkland, Washington. The charge was filed in State court. About $2,600 was taken in this robbery (R. 22, 28, 29, 34).[2]

On January 2, 1963 Richard James Young left the State of Washington for the first time since the Kirkland robbery and went to Portland, Oregon (R. 611). On Jan-

[2] Parenthetical references are to the typewritten record of the trial in District Court.

uary 7, 1963 the United States charged Young with unlawful flight from Washington with intent to avoid prosecution for the Kirkland grocery store robbery (R. 43).

While in Oregon, Young planned and, on January 24, 1963 robbed a Portland, Oregon bank of approximately $55,000 (R. 686). Young then travelled from Portland, Oregon to Salt Lake City, Utah to Los Angeles, California and then to the San Francisco area. Young stayed in the San Francisco area, with three exceptions noted hereafter, from February 4 to March 28, 1963 (R. 688-692, 699).

Young and one Jerome Oral Tichenor came to Vancouver, Washington for a few hours on February 19, 1963. What the purpose of the trip was and what took place there is not known as the witness Young refused to answer such questions on the grounds that the answers might tend to incriminate him (R. 695, 696).

Young and Tichenor came to Seattle on March 4, 1963 and planned and, on March 8, 1963, robbed the Northgate branch of the Bon Marche Department Store of approximately $40,000 (R. 723). Within hours after this robbery, Young and Tichenor fled from Bellevue, Washington to Oakland, California (R. 655).

There was some evidence, which the Circuit Court apparently believed, that Young returned to Seattle, Washington again on or about March 22, 1963, robbed a bank of between $4,000 and $7,000 and returned to the San Francisco area. Appendix B hereto, *infra*, p. 4a.

On March 28, 1963 Richard James Young left San Francisco, California, bound for Rio de Janeiro, Brazil (R. 633). Young was returned from Brazil and arrested on April 5, 1963 (R. 737).

The petitioner, Ned Edward Hett, was born February 13, 1935 and is a practicing attorney in the City of Seattle, Washington, having been admitted to practice in the Spring of 1960 (R. 1055, 1060). The petitioner first met Richard James Young on June 24, 1961 when Young was referred to the petitioner's law office through the local Legal Aid Bureau concerning a divorce (R. 1064). Petitioner represented Young on this matter and Young and his second wife on many other matters until June, 1963 (R. 675).

The petitioner testified extensively in his own defense (R. 1055-1187; 1217-1393). He denied the accusations of aiding, counselling and abetting the trips of Young from Bellevue, Washington to Oakland, California and from San Francisco, California to Rio de Janeiro, Brazil as alleged in Counts I and III. Petitioner also denied knowingly concealing and failing to report the interstate and foreign trip of Young as alleged in Counts II and IV other than to the extent to which he was bound to remain silent by the Canons of Professional Ethics of the American Bar Association and the Washington Court rules on Professional Ethics. He also denied comforting and assisting Young to prevent and hinder his apprehension as alleged in Count V.

This denial of participation was one of the two prongs

of petitioner's defense on the facts. It is conceded, for the purpose of this petition only, that the Government presented sufficient evidence to prevent petitioner from obtaining a reversal of his conviction on the basis of lack of evidence of the petitioner's denied participation.

The other prong of petitioner's defense on the facts related to the motive, purpose and intention of Richard James Young in travelling from Bellevue, Washington to Oakland, California on March 8, 1963 and in travelling from San Francisco, California to Rio de Janeiro, Brazil on March 28, 1963. The trial court instructed the jury (with the approval of the Government) that a necessary element of each and every count of the Indictment was

> ". . . the purpose and intent of Richard James Young in taking the trips in interstate and foreign commerce on or about March 8, 1963 and March 28, 1963 must have been to avoid prosecution in the State of Washington for the robbery of a grocery store which occurred in Kirkland, King County, Washington on December 1, 1962.
>
> By this it is meant that you must be satisfied beyond a reasonable doubt that a principal reason for Young's making such trips was to avoid prosecution for the Kirkland robbery. In this regard, the fact that Young may also have had an intent to make such trips intending to avoid prosecution for other crimes is no defense so long as one of his principal reasons was to avoid prosecution for the Kirkland robbery" (R. 1442)

The evidence presented by the Government on the issue of Young's motive, purpose and intent consisted of the testimony of Richard James Young and to some extent that of Jerome Oral Tichenor. The witness Young had previously

been convicted of and sentenced for one Federal crime and was awaiting sentence on three others.

The witness Young was called by respondent (R. 607). On direct examination Young testified that he was in Kirkland, Washington on December 1, 1962, and that on the day following he went to Sequim, Washington (R. 608). Young further testified as to his activities and contacts with petitioner between early December, 1962 and March 3, 1963 (R. 608-644). He testified that on March 4, 1963 he came to Seattle (R. 645) and that he left Seattle on March 8, 1963 in petitioner's private airplane (R. 652). He also testified as to his motive and purpose in making the interstate and foreign flights which were at issue in the trial. On cross-examination Young testified that he also came into the State of Washington on February 19, 1963 but refused, on the grounds of self-incrimination, to state why he had come into the State (R. 695, 696).

When asked his reason for coming to Seattle, Washington on March 4, 1963, the witness refused to answer on the grounds of self-incrimination, which claim of privilege was sustained (R. 702, 704). A similar claim of privilege by the witness was allowed by the trial court with regard to the witness' reason for being at the Northgate Bon Marche during the week of March 4, 1963 (R. 705); where the witness was at 7:00 p.m., March 8, 1963 (R. 706); where the witness had been prior to being at the Bellevue Airport on the night of March 8, 1963 (R. 707); and why the witness wanted to travel from Seattle, Washington to

Oakland, California on the night of March 8, 1963 (R. 707, 708).

It was stipulated by counsel following this last in a series of claims of privilege, that Richard James Young and Jerome Oral Tichenor robbed the Northgate Branch of the Bon Marche on March 8, 1963 (R. 723). At that time the court ruled that questions as to Young's motives or purposes in travelling might be asked by petitioner and respondent but that Young, in answering the questions, was entitled to exclude from his answers any reference to motives based on possible crimes about which he had refused to testify on the grounds of self-incrimination.[3]

Thereafter respondent, on re-direct, was allowed to ask

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[3] The witness was asked by petitioner, "Why was it you wanted to move from Seattle to Oakland that night [March 8, 1963]?" The Court permitted the witness to refuse to answer on the grounds that it might incriminate the witness (R. 707, 708, 711). It was thereafter stipulated that the witness robbed the Northgate branch of the Bon Marche on March 8, 1963. Respondent then stated its understanding of the permissable scope of inquiry to be:

> "Your Honor, we will inquire and I have no objection to Mr. Guterson inquiring, as to any other reasons he may have had for leaving that day." (R. 720).

Petitioner then asked if "it would still be proper to go on and then ask the witness as to whether or not this [the Bon Marche robbery] was the reason why he left an hour or two after this robbery?" (R. 721). The court ruled:

> "I won't require the witness to answer that specific question, but I would permit you to ask a general question as to whether he left the State of Washington in connection with a crime he committed in the State of Washington or to avoid arrest while he was in the State of Washington during that period. He has already admitted that he committed one crime here. But anything that directly ties him in with a robbery where there was also a possible Federal crime committed, if he stands on his Constitutional rights I am going to recognize his privilege." (R. 721, 722).

Young whether at least one of the reasons for the flights of the witness was to avoid arrest as to all matters including the Kirkland robbery, and the witness indicated that it was (R. 754, 755).

On re-cross the witness Young was again allowed to refuse to answer inquiry on the grounds of self-incrimination as to whether he had signed a statement absolutely negating as a reason for interstate or foreign travel any fear whatsoever of prosecution for the Kirkland robbery (R. 770-775).

The witness Tichenor was called by respondent. On direct examination by the Government, Tichenor testified freely and without limitation. The witness testified that on March 4, 1963 he and Richard James Young flew to Seattle and that they left in petitioner's airplane on March 8, 1963 (R. 528, 535).

On cross-examination, the witness immediately began a series of refusals with regard to questions, the answers to which he claimed would tend to incriminate him (R. 551, 573, 577, 591, 592). The witness was asked his purpose in coming to Seattle on March 4, 1963 and he was permitted to decline to answer (R. 577). He was similarly permitted to refuse to answer as to what he and Young had done between 9:00 and 9:30 p.m. on the night of March 8, 1963 (R. 583, 584).

VI.

REASONS FOR GRANTING THE WRIT

Question A: Right to Cross-Examine

1. The decision of the court below is in conflict with decisions of the Second, Fourth and Eighth Circuit Court of Appeals in *United States v. Cardillo*, 316 F. 2d 606 (C.A. 2, 1963) cert. den. 375 U.S. 822, 11 L. Ed. 2d 1136, 84 S. Ct. 60 (1963), reh. den. 375 U.S. 926, 11 L. Ed 2d 169, 84 S. Ct. 263 (1963); *United States v. Smith*, 342 F. 2d 525 (C.A. 4, 1965); *Smith v. United States*, 331 F. 2d 265 (C.A. 8, 1964); and *Coil v. United States*, 343 F. 2d 573 (C.A. 8, 1965), and impliedly in conflict with the decision of this Court in *Douglas v. State of Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed 2d 934 (1965).

Each of the cases from the Second, Fourth and Eighth Circuits holds that the direct testimony of a witness should be stricken if that witness later takes the Fifth Amendment and refuses on cross-examination to answer germane questions on the subject matter of his direct examination. In each of these cases, the court first concerns itself with the direct examination of the witness, then the cross-examination, and then ascertains whether the cross-examination is on collateral or germane matters.

As the court stated in the *Cardillo* case:

> ". . . if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because

> the defense is deprived of the right to test the truth of his direct testimony, and, therefore, that witness's testimony should be stricken in whole or in part."

In the instant case, the court concerned itself exclusively with the issue of whether the witness waived the Fifth Amendment privilege, decided that there was no waiver, and then concluded that the trial court properly refused to strike the direct testimony of the witness. There was no inquiry as to whether the questions which the witnesses refused to answer were collateral or germane to the direct testimony of the witnesses. Appendix B, *infra*, pp. 9a, 10a. In so doing, the court failed to adopt and apply the rule which prevails in the Second, Fourth and Eighth Circuits. It is this conflict between Circuits which petitioner believes should be resolved.

The decision of the court below is also impliedly in conflict with the decision of this Court in *Douglas v. State of Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). In that case a witness hostile to the prosecution refused to answer when asked by the prosecutor whether the witness had signed a statement implicating the witness and the petitioner in the crime with which the petitioner was charged. The prosecutor was permitted to read the statement and call three law enforcement officers to testify that it was given by the witness voluntarily. The petitioner was not afforded the opportunity to cross-examine as to the contents of the statement as it was never admitted into evidence and the witness refused to answer whether or not he had made such a statement.

This Court reversed petitioner's conviction and held the reading of the statement and the testimony of the officers should have been excluded or stricken as petitioner was denied the right to cross-examine the witness as to the contents of the statement which related to material matters. Certainly the court below in this case should have applied the same rule when the testimony which was admitted was from two willing Government witnesses who answered all questions propounded to them by the Government but refused to answer germane questions on the subject matter of the direct examination when asked by petitioner on cross-examination.

2. Clearly, the question is of great importance in the administration of justice in Federal criminal cases. Settlement of the question is plainly in the public interest since it is bound to be raised again and again in Federal criminal prosecutions in which the Government's case depends in whole or in part on the testimony of a witness who has participated with the accused in the crime or a crime related to that which the accused is charged. A substantial percentage of government prosecutions were in this category even before the decision in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 S. Ct. 1954, 12 L. Ed. 2d 678 (1964). The number of times the question raised by petitioner will be again raised by persons accused of Federal crimes is bound to increase now that a witness may also decline to answer questions the answers to which might tend to incriminate him of charges under State law. The

Government will not even be able to grant such a witness immunity from such State charges to permit the accused appropriate latitude in cross-examination.

3. The question is an important question of Constitutional law which has not been, but should be, settled by this Court. Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth."[4] It is well settled that the right of a defendant in a Federal court to confront the witnesses against him, guaranteed by the Sixth Amendment, includes the right to cross-examine the witness. *Pointer v. State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).

What has not been settled is whether an accused is denied the right to confront a witness essential to a fair trial by a trial court's refusal to strike the direct testimony of that witness after the witness invokes the Fifth Amendment and refuses to answer, on cross-examination, germane questions on the same subject matter as the direct examination. This Court should exercise its discretionary power to review and resolve for all of the United States such an important and fundamental question.

4. The decision of the Court below is believed to be erroneous and the conflicting decisions in the other three Circuits correct. This Court has previously held in *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624

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[4] 5 Wigmore, Evidence, § 1367 (3rd ed. 1940).

(1931) that a Federal conviction will be reversed if the cross-examination of Government witnesses has been unreasonably limited.

The restriction of cross-examination in petitioner's trial was clearly unreasonable. The Government's chief witness, Richard James Young, was involved, between December 1, 1962 and March 28, 1962, in at least four separate robberies yielding a total of over $100,000. Young refused to answer questions relating to one of the robberies which yielded about $40,000. Young also refused to answer questions relating to what he was doing in the State of Washington on February 19, 1963. He may have committed another robbery or a more heinous crime on that day. All of these questions were germane to the issue of why Young made the two trips which were the basis for the charges against petitioner.

The trial court instructed that in order to convict petitioner the jury must find that a principal reason for the flight of the Government witness in interstate commerce on March 8, 1963 and in foreign commerce on March 28, 1963 was to avoid prosecution for the December 1 robbery which yielded but $2,600 which is about two percent of the proceeds from the four known robberies. The flight of the witness on March 8, 1963 took place within hours after a $40,000 robbery. The preliminary idea of the flight to Brazil first formed after a $55,000 robbery on January 24, 1963. The plans for the Brazilian flight were not perfected and executed until after the perpetration of at least four robberies.

Against this background of instruction and known fact, the "why" of the witness' flight became all important as to each of the counts of the Indictment. Against this background, the witness refused to answer questions, the answers to which probably would have shown strong motive for both flights which was not based on the December 1, 1962 Kirkland robbery – i.e., what the witness did on February 19, 1963. Against this background, the witness refused to testify as to whether the March 8, 1963 $40,000 robbery motivated his flight on that day. Against this background, the witness refused to testify as to whether or not he signed a statement in the presence of his counsel and under oath disclaiming the Kirkland robbery as a motive for either of the two flights in question. The admission into evidence of such statement was denied. Against this background, the witness *was* permitted to testify as to part *but not required to testify as to all* of his activity during the time in question which might have supplied a motive for his travel. Of perhaps greatest importance, the witness was permitted to testify directly as to his motive and purpose in travelling without any reference to the extent to which he was motivated by other possible (or stipulated) crimes about which he had refused to testify.

Petitioner would not be raising this question to this Court if the questions asked on cross-examination had been directed solely toward collateral attacks on the credibility of the witness. Petitioner recognizes that the trial court has the right to limit cross-examination on collateral mat-

ters. However, in this case, none of the questions were in the nature of collateral attacks on the witness Young's credibility. Instead, every question was directed to the "why" of Young's movements on the very dates involved in petitioner's trial. What could be more germane?

Clearly, the fate of an accused should not rest only on that portion of the material testimony that the accusing Government deems to be of importance, but rather should rest on all material testimony subject to reasonable cross-examination. The rule adopted by the Second, Fourth and Eighth Circuit Court of Appeals should have been adopted by the Ninth Circuit and applied to petitioner's case by striking the the direct examination of the witnesses Tichenor and Young.

Question B: Interpretation of 18 U.S.C. §1073

1. The question affects the lives of many persons and is of great importance in the administration of justice in Federal and state criminal cases. It is an important question which is rarely presented in a forum which is subjected to review by this Court and, as a result, the question has not been, but should be, settled by this Court.

Petitioner, respondent and the court below were unable to find any reported cases dealing with the question presented in this petition. This is to be expected. The entire philosophy that caused the Congress to pass Title 18, United States Code, Section 1073, was to provide a Federal jurisdictional basis and the attendant F.B.I. investigative

strength to assist local law enforcement at the crime scene in apprehending one who was charged with a serious state crime and who had fled the scene to avoid prosecution.[5]

Invariably, when the felon is caught, he is simply held under the Federal warrant until the local authorities extradite and then prosecute him for the state felony. The Federal charge is only rarely pursued beyond the Commissioner's level and few of these are appealed. Yet Title 18, United States Code, Section 1073, is applied to a significant number of persons each year whose rights and lives are just as surely affected by its application as those of persons accused of Federal crimes of a nature which are frequently reviewed by appellate courts.

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[5] This legislative intent is clearly demonstrated by the language of House Report No. 827, Aug. 1, 1961 (To accompany H.R. 468 [18 U.S.C. 1073], U.S. Congressional and Administrative News [87th Congress, 1st Session, 1961] p. 3242. It is there stated that the purpose of the legislation is to ". . . assist local law enforcement agencies in the apprehension of fugitives through the services of the Federal Government."

The Report, at p. 3243, goes on to say:

> "The reason for the foregoing conclusion by the Department of Justice is that the established practice under existing law will not be altered by the proposed amendment. That practice is to limit Federal intervention generally to those instances wherein the State has indicated a clear intention to secure the return of the fugitive for the purpose of bringing him to trial before a State Court. Such intent may be evinced either by the existence of a State indictment or the expressed intention on the part of the local law enforcement official to prosecute the fugitive. Thus, the effect of this practice is to limit the application of the act, and, thus, the investigative efforts of the Federal Bureau of Investigation, to those criminal cases, in which the State has demonstrated sufficient interest in obtaining the return of the fugitive to warrant incurring the necessary expenses incident to extradition. Experience has indicated that the States are not willing to undertake such expenditures unless the fugitive is wanted for a serious crime or a person's presence as a witness is necessary for the successful prosecution of a serious crime."

Petitioner submits that this Court's discretionary power to review should be exercised when the question presented affects a large number of persons in contact with the administration of justice in Federal and state criminal cases but the nature of the Federal activity is such that it rarely is exercised in such a manner as to be subject to review by this Court. It may well be several decades before this question is again presented for review – yet, in the meantime, literally thousands of persons will have been subjected to the authority of the Federal government under Title 18, United States Code, Section 1073, without the benefit of the safeguards of review by this Court.

2. The decision of the court below is believed to be erroneous. Petitioner submits that it is simply not a crime under Title 18, United States Code, Section 1073, for a person charged with robbery in one state to travel in interstate or foreign commerce if the origin of the trip is not in the charging state. Therefore, Counts III, IV and V of the Indictment against the petitioner failed to charge the accused with a crime. The plain meaning of the statute is that the flight must be from the place seeking to prosecute the one in flight. This is exactly what the statute says:

> "Whoever moves or travels in interstate or foreign commerce with intent . . . to avoid prosecution . . . *under the laws of the place from which he flees* . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added)

The rule of statutory construction which calls for giving

language its plain, obvious and rational meaning is well known to this Court. If there be any question regarding interpretation of the statute, the rule requiring a criminal statute to be strictly interpreted in favor of the accused should be followed. See *Smith v. United States*, 360 U.S. 1, 3 L. Ed. 2d 1041, 79 S. Ct. 991 (1959), and see also the District of Columbia Court of Appeals decision in *Durbin v. United States*, 221 F. 2d 520 (1954) where a Circuit Court held the rule of strict construction to apply to another facet of Title 18, United States Code, Section 1073.

The statute plainly states that the flight of the witness Young must be one "to avoid prosecution . . . under the laws of the place from which he flees." Perhaps the law should be different – maybe it should be a crime to go from California to Brazil to avoid a Washington prosecution. However, under the law as it now plainly reads, the charge must be that the felon moved from Washington to California; or from Washington through California to Brazil; or from Washington to Brazil. This was clearly not the charge against petitioner in the flight of Young to Brazil from California allegedly to avoid prosecution under the laws of a place from which he did not flee – namely, Washington. The fact that the trip may have been one which was a part of a trip originating in the charging state is of absolutely no significance as the jury was not required to find this to be the fact in order to convict the petitioner. In fact, the jury acquitted the petitioner of Count I which involved the flight of the witness from the charging state.

Petitioner submits that the court below erred in failing to interpret the statute in the manner urged by petitioner.

VII.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 1966

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, United States Code, Section 2:

> §2. *Principals*
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (62 Stat. 683. As amended Oct. 31, 1951, c. 655 §17b, 65 Stat. 717).

Title 18, United States Code, Section 3:

§3. *Accessory after the fact*

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years. (62 Stat. 683)

Title 18, United States Code, Section 4:

§4. *Misprision of felony*

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both. (62 Stat. 683)

APPENDIX B

OPINION OF THE CIRCUIT COURT

United States Court of Appeals for the Ninth Circuit

19,321

NED EDWARD HETT,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

(November 18, 1965)

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: CHAMBERS, POPE and KOELSCH, Circuit Judges.

CHAMBERS, Circuit Judge:

Out of a near partnership in crime with a robber named Richard James Young, the defendant-appellant Ned Edward Hett, a young Seattle lawyer, stands convicted of four of five counts of an indictment concerned with Young's zigzagging flights to avoid capture and prosecution.[1] Young fled to Brazil, but was returned to the United States, where he became the main witness against Hett.

Late in 1962 and early in 1963, Young was involved in four Washington-Oregon robberies as follows:

---

[1]Much of Young's travel was in preparation to commit more violent crimes.

1. On December 1, 1962, the robbery of a Kirkland (near Seattle, Washington) grocery store–about $2,600 was taken.

2. On January 24, 1963, a robbery of a branch of the United States National Bank in Portland, Oregon, of approximately $55,000.

3. On March 8, 1963, a robbery of the Northgate branch of the Bon Marche Department Store at Seattle of about $40,000.

4. On March 22, 1963, a robbery of a branch of the Seattle-First National Bank of $4,000 to $7,000.

The five counts of the indictment were as follows:

1. That on March 8, 1963, (the evening of the Bon Marche robbery) Hett aided and abetted Young to travel in interstate commerce from Bellevue, Washington,[2] to San Francisco, California, to avoid prosecution for the state crime of robbing the Kirkland grocery store.

2. That on or about March 8, 1963, knowing of Young's commission of the Kirkland robbery, a felony, and Young's flight to avoid prosecution, Hett concealed the fact and did not report it to proper authority.

3. That on or about March 22, 1963, Hett did aid and abet Young to flee[3] from San Francisco to Brazil in interstate and

---

[2]Hett provided the airplane (his) which took Young from Bellevue to San Francisco on the night of March 8.

[3]The flight from San Francisco to Brazil was on March 28, 1968.

foreign commerce to avoid prosecution in Washington for the Kirkland robbery of December 1, 1962.

4. That on or about March 29, 1963, Hett, knowing that Young had moved in interstate and foreign commerce from San Francisco to Brazil to avoid prosecution for a robbery in Washington, concealed it and did not report it to proper authority.

5. That on or about March 29, 1963, Hett, knowing of Young's offense of flying from Seattle to Brazil to avoid a felony prosecution in Washington, did comfort and assist Young to prevent his apprehension and trial.

In the foregoing counts we see that the flights of counts I and III are specifically ascribed to the first robbery at Kirkland on December 1, 1962.

The jury acquitted Hett on count I and found him guilty on counts II, III, IV and V. Sentence was imposed by the court. The only money fine was on count III. The time sentences on counts II, IV and V were concurrent with and did not exceed the time imposed on count III. Herein we conclude that the conviction on count III should stand. Thus, under Sinclair's case, 279 U.S. 263, we do not reach the other three counts.

There is no doubt of the sufficiency of the evidence to convict Hett of count III if it is a good count. But Hett had and has a number of substantial points.

First, he takes us to the statute, 18 U.S.C. §1073 (Young's offense), which reads:

> "Whoever moves or travels in interstate or foreign commerce with intent . . . to avoid prosectuion . . . under the laws of the place from which he flees . . . shall be fined not more than $5,000 or imprisoned not more than five years or both."

Under this statute, he says that the actual physical flight must be (that is, must start) from the state from whose prosecution the felon flees. The appellant and the government can find no case squarely on the point. Neither can we. However, we have little trouble in concluding that under the statute one may move (start) from State B to State C and in doing so his intent may be to flee from prosecution in State A, a place from which he had already left. To hold otherwise would be hypercritical and not merely strict construction. Appellant suggests also that the segment from San Francisco to Brazil cannot be segregated; that if it can, a flight by plane across a dozen state lines could constitute a dozen crimes. We think not. This is not a case of a non-stop flight or only a stop-over to catch the next flight. In the latter cases, when they come here, we can rule on how many crimes may be committed in continuous flights. Here there was a pause of several days in the San Francisco area before the departure to Brazil. That pause would be enough, possibly, to make two crimes of flight – one fleeing into San Francisco and one fleeing out. Or the trip to San Francisco could be no crime at all.

It is obvious that Young did not commit his part of the crime of count III in the State of Washington. So how was Hett triable in the district court in the State of Washing-

ton? It is because Hett's aiding and abetting activities, quite intricate and extensive, were performed mainly in the State of Washington. Thus, the Washington district court had jurisdiction and venue.

Also, Hett has a rather appealing point built around the Mortenson case, 322 U.S. 369, which involved the vacation trip on which the house proprietors took the prostitutes from Grand Island, Nebraska, to Salt Lake City and back to Grand Island. The prosecutor there reasoned that the trip back to Grand Island was an immoral thing within the Mann Act. But the Supreme Court held that the dominant motive must be an illegal one. Here Hett says the jury should have been instructed that to convict it must be found that the dominant purpose of the flight from San Francisco to Brazil was to flee from the Kirkland robbery. (Hett thinks this was not so because the Kirkland robbery was the oldest; Young repeatedly thereafter crossed back into Washington and, furthermore, Kirkland was the smallest of the four robberies and involved only about two per cent of the loot.) We think it might be stretching a point to say Young's motive, dominating all others, was to flee from prosecution on the Kirkland crime. But the jury was instructed it was enough if a (one) dominant motive was to flee from prosecution on the Kirkland crime. Obviously, he was fleeing from the four crimes he had committed – a package of his own creation. Each crime piled on the next would increase the probability of prosecution on one or more. And Young and Hett would know it might be any one of them.

Often, crime B gives the impetus to prosecute stoutly, but crime A may be chosen as the first prosecution because it is more readily provable. A man with a previous criminal record, such as Young had, would know this. The argument of Hett was a good one to make to the jury and he lost it. It is not a a good one against the court's instruction saying that "a dominant motive" was enough.

Mortenson must be read in the light of its facts. There was a case of a good motive and of a possible illegal one. It would be quite correct with a choice of only two motives, one good and one bad, to say to the jury that the bad one had to be the dominant one. But here Young's course at the time seems to have been devoid of anything that involved something good like the benign one of giving the Nebraska girls in Mortenson a vacation.

Hett also urges that he had an attorney-client relationship which prevented him from reporting on Young's activities as charged in counts II and IV. And he offered to prove this by another attorney (this was not permitted) whom he brought to court as an expert. But we need not examine these counts because any sentence thereunder is within the sentence of count III.

Objection is made to the introduction of one document sent by Hett to Young. It is asserted there was no adequate foundation. The record indicates otherwise. Then it is said it invaded the attorney-client relationship. Certainly it was not a confidence of the client to the lawyer. True, we have

held that an attorney may assert his client's privilege,[4] but here Young, very much present as a government witness, was asserting no privilege of attorney and client. Further, it was a communication concerning an illegal activity which, when found, is not ordinarily blessed with a claim of privilege.

The key government witnesses implicating Hett were Young, as indicated, and Young's confederate, Tichenor. The two testified extensively without reservation on direct examination. Then on cross-examination each testified for a while and then claimed privilege against self-incrimination. The privilege was allowed. The court refused to strike the direct testimony. Hett says the privilege had been waived but if not the direct testimony should have been stricken. The argument is quite attractive, but our examination of the record does not sustain it. We think the record does show that the claim of privilege was a valid one, especially since the intervening decision of Murphy v. Waterfront Commission, 378 U.S. 52, holding one's privilege is not limited to protecting one against federal prosecution. The question of waiver by Tichenor and Young is a close one. But the questions apparently sought answers which primarily concerned count I – on which Hett was acquitted.[5] Also, it is difficult to perceive how the answers Hett was seeking could have helped him. On the record, on the claim of waiver of privi-

[4]See United States v. Judson, 9 Cir., 322 F.2d 460. We have not held that an attorney may invoke his client's privilege when the client (here, ex-client) is standing out in the hall near the courtroom.

[5]See Blassingame v. United States, 9 Cir., 254 F.2d 309.

lege and the related question of striking, we find no error.

Appellant has objected to comment of the court through a question put to a witness. We find the comment unobjectionable. Further, it does not concern count III.

We find that Hett was properly convicted. The judgment is affirmed.

APPENDIX C

JUDGMENT OF CIRCUIT COURT

United States Court of Appeals for the Ninth Circuit

NED EDWARD HETT,	*Appellant,*	No. 19,321
UNITED STATES OF AMERICA	*Appellee.*	

APPEAL from the United States District Court for the Western District of Washington Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Nov. 18, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 964

NED EDWARD HETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 353 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965. A timely petition for rehearing was denied on January 3, 1966. The petition for a writ of certiorari was filed on January 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error by refusing to strike the direct testimony of

two witnesses who invoked the privilege against self-incrimination on cross-examination.

2. Whether, in order to constitute an offense under 18 U.S.C. 1073, a trip in commerce with intent to avoid prosecution for a State offense must have commenced in the State where the offense was committed.

STATUTE INVOLVED

18 U.S.C. 1073 provides in pertinent part:

> Whoever moves or travels in interstate or foreign commerce with intent * * * to avoid prosecution * * * under the laws of the place from which he flees, for a crime * * * which is a felony under the laws of the place from which the fugitive flees, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On February 7, 1964, petitioner was convicted by a jury in the United States District Court for the Western District of Washington on four counts of a five-count indictment charging him with violations of 18 U.S.C. 2, 3, 4 and 1073 (R. I, 21). Petitioner was sentenced to imprisonment for a period of five years on count III, and with lesser concurrent prison terms on the other counts (R. I, 25).[1] The court of appeals affirmed the conviction under count III without consideration of the other counts (R. I, 35–39; Pet. App. B). Count III charged petitioner under 18 U.S.C. 1073 with aiding, counselling and abetting one Richard Young in travelling in foreign commerce with the intent to avoid prosecution in the State of Washing-

[1] Petitioner was sentenced to three years on count II, to two and one-half years on count IV, and to three years on count V.

ton for the December 1, 1962, robbery of a grocery store in Kirkland, Washington.

1. The evidence at trial showed that petitioner was the attorney for Richard Young and his wife, representing them in domestic affairs litigation and other matters (R. III, 81–82, 106–111; R. V, 608, 663–675). On December 1, 1962, a grocery store in Kirkland, Washington, was robbed of approximately $2,600 (R. III, 34, 49; R. VI, 751–752). Nine days later, a complaint charging Young with the Kirkland robbery was filed with the county prosecutor (R. III, 25–29, 50, 56). Petitioner was informed of the charge and shown a copy of the warrant for Young's arrest on January 4, 1963 (R. III, 29–31). On January 7, 1963, an additional complaint was filed in the federal district court charging that Young had fled the state of Washington with the intent to avoid prosecution for the Kirkland robbery (R. III, 44, 51–53). Petitioner became aware of this outstanding warrant by at least January 30, 1963 (R. III, 45–46, 164–165; R. V, 612).

In the meantime, on January 24, 1963, Young and another man robbed a bank in Portland, Oregon, of about $55,000 (R. III, 69–70, 125; R. IV, 398–400; R. V, 683–687, 690; R. VI, 746–747). Young thereafter fled south to Salt Lake City, Los Angeles and San Francisco (R. III, 73; R. V, 687–691). During the period preceding and following the Oregon robbery, Young was in weekly communication with petitioner (R. V, 611), and met with him on about January 20 (R. V, 612).

Some time in February, 1963, Young decided that the threat of prosecution made it desirable for him to

attempt to leave the country (R. VI, 743–745). He discussed with petitioner the various crimes he was accused of and the possibility of departing the country (R. V, 638). Petitioner wrote letters to appropriate agencies requesting birth certificates and information regarding the requirements for a permanent visa to Brazil (R. IV, 397–398).

On the weekend of March 1–3, 1963, petitioner flew to San Francisco with Mrs. Young to discuss with Young means for facilitating Young's departure from the United States (R. III, 89–90, 104–106; R. IV, 367–368; R. V, 523–527, 613–616, 700). At this meeting Young told petitioner that he and one Tichenor were coming to Seattle in the near future and would require transportation out of the Seattle area (R. V, 615, 644). On March 4, 1963, Young and Tichenor arrived in Seattle (R. IV, 368; R. V, 528–529, 550, 644–645, 701). Petitioner met with Young and Tichenor at least three times in the next five days (R. V, 645–650). At one of the meetings, petitioner suggested that Young disguise himself while in the Seattle area; and, for this purpose, petitioner ordered frame glasses from his optometrist (R. V, 497–504, 518, 522, 529–532, 646–647). Arrangements were also made for Young and Tichenor to fly back to California in petitioner's airplane (R. V, 648, 651).

On March 8, 1963, Young and Tichenor robbed the Northgate Bon Marche store in Seattle of about $40,000 (R. VI, 719–723). On that day, petitioner was informed that the two men were ready to leave Seattle (R. V, 652). A pilot, who was paid $300 by petitioner for the flight, flew Young and

his companion to California in petitioner's plane (R. V, 535, 651–655; R. VI, 724, 872–877). Young paid petitioner $1,000 for the flight (R. V, 653, 656).

Following his meeting with Young in San Francisco, petitioner set about to create a new identity for Young as "John T. Anderson" in order to facilitate obtaining a passport and Brazilian visa (R. III, 169–172, 186, 204–206, 223–225; R. IV, 226–247, 297–304). By the third week in March, petitioner had secured all the documents necessary for Young's departure from this country (R. IV, 226–247, 297–304; R. V, 616–618) and mailed these to petitioner's mother-in-law in California, where Young picked them up (R. IV, 211–213; R. V, 618–628). Between March 9 and March 28, 1963, petitioner and Young were in almost daily communication (R. V, 616, 637–638). Young sent petitioner between $10,000 and $14,000 during February and March (R. V, 657) and also rented a safety deposit box jointly with petitioner in California in which he deposited about $17,000 in travelers' checks made out to petitioner (R. V, 657–663; R. VI, 802–806).

On March 28, 1963, after informing petitioner that he was leaving the United States, Young departed for Brazil using the documents supplied by petitioner, supplemented by additional documents obtained by Young in California (R. V, 633). Young wrote several letters and telegrams to petitioner from Brazil using the name of Bowen (R. IV, 371–378; R. V, 638–644). Petitioner in turn corresponded with Young in care of "Bowen" stating that everything was all right and that the authorities were

frustrated (R. III, 172–173; R. IV, 371–378; R. V, 473–478, 639–644; R. VI, 921–922).[2]

Petitioner was arrested, with Mrs. Young, while they were in California trying to arrange documents and clearance for Mrs. Young to join her husband in Brazil (R. III, 82–103; R. IV, 369, 387–417, 428–439). Young was returned to the United States from Brazil and arrested on April 5, 1963. Still in his possession were documents supplied by petitioner (R. III, 169–172; R. V, 644, 737). Young stated that one of the reasons for the flight to Brazil had been to avoid arrest and prosecution for the Kirkland grocery store robbery of December 1, 1962 (R. V, 638; R. VI, 745, 755–756, 766–776).

2. The evidence summarized above appeared principally through the testimony of Tichenor and Young. One of the questions raised in the petition relates to the cross-examination of these witnesses.

a. Tichenor testified on direct examination that he had first met Young in Oakland, California, during February, 1963 (R. V, 523), and that he first saw petitioner in California during the first weekend in March (R. V, 523–527). Tichenor testified that he went to Seattle with Young on March 4, 1963 (R. V, 528), was present at various meetings with petitioner

[2] On March 29, 1963, F.B.I. agents left circulars at petitioner's office stating that Young was wanted by the federal authorities for fleeing the State of Washington to avoid prosecution, was armed and extremely dangerous and requesting anyone possessing information as to Young's whereabouts to communicate with the local F.B.I. office (R. III, 47–48, 165–167; R. IV, 393).

(R. V, 529–533), and left Seattle for California in petitioner's airplane on March 8, 1963 (R. V, 535).

On cross-examination, Tichenor at first refused to state his purpose in coming to Seattle on March 4 (R. V, 550–551, 577).[3] Tichenor was directed to answer and admitted that he came to Seattle on March 4, 1963, "in connection with the proposed robbery of the Northgate Branch of Bon Marche" (R. V, 577). He further testified that he and Young were together at the Bon Marche from 9:00 to 9:30 p.m. on March 8 (R. V, 583, 590, 595–596). Tichenor was permitted to refuse to answer what Young did during that time interval (R. V, 583–584), whether he or Young had anything on their faces while at the Bon Marche (R. V, 591), where he was in the Bon Marche (R. V, 591–592), what he and Young did in the Bon Marche (R. V, 591) and whether he and Young had robbed the Bon Marche on that occasion (R. V, 592). It was then shown that Tichenor had entered a plea of guilty to the charge of transporting $40,000 in stolen money from Seattle to California on March 8, 1963 (R. V, 599–600).

b. After giving the testimony summarized at pp. 3–6, *supra,* on direct examination, Young testified on cross-examination as to his movements between the

[3] In a bench conference, counsel said he expected to show that Tichenor and Young arrived in Seattle on March 4; that they stayed in Seattle until the evening of March 8; and that their major purpose while in Seattle was to plot and execute the robbery of Bon Marche, which they did about 9:00 p.m. on March 8, 1963 (R. V, 558).

Kirkland robbery on December 1, 1962, and his trip to California following the Portland bank robbery on January 24, 1963 (R. V, 677–694). Young also testified that he and Tichenor took a trip to Vancouver, Washington, and Portland, Oregon, in the middle of February, 1963 (R. V, 695–699), but refused to give the reason for the trip on the ground of possible self-incrimination (R. V, 696). Defense counsel did not press the point (R. V, 697). Young then testified about the March 1–3 conference with petitioner in California (R. V, 700–702) and his arrival with Tichenor in Seattle on March 4, 1963. He refused, however, to give his "reason or intent or purpose" for coming to Seattle at that time (R. V, 702–704). He continued to testify about his activities in Seattle, including the fact of his presence at the Bon Marche, but he refused to say why he was at the Bon Marche (R. V, 705). He also refused to say where he was about 7:00 p.m. on March 8, 1963 (R. V, 706), to state the place from which he had come to the airport that night (R. V, 707) or why he wanted to move from Seattle to California on March 8 (R. V, 707). At this point, defense counsel showed that Young had entered a plea of guilty to an indictment charging Young and Tichenor with transporting $40,000 in stolen money from Seattle to Oakland, California, on March 8 (R. V, 708–709). Young refused, however, to give the source of the $40,000 (R. V, 709–712). After a recess, government counsel stipulated that Young and Tichenor had robbed the Bon Marche on March 8 (R. VI, 719–723). Defense counsel asked no

more questions about the Bon Marche robbery on cross-examination (R. VI, 724–750).[4]

ARGUMENT

1. The trial judge acted well within his discretionary powers to regulate the scope of cross-examination when he permitted Young and Tichenor to invoke their privilege when asked questions calling for a direct admission of the Bon Marche robbery and when he refused to strike the direct testimony of these two witnesses on that account. As pointed out by the court of appeals (Pet. App. 9a), it is difficult to perceive how a further inquiry into the Bon Marche robbery would have helped petitioner. It was obvious that Young and Tichenor came to Seattle on March 4 primarily to plan and execute the Bon Marche robbery; and the government stipulated that they did, in fact, commit that robbery on March 8, 1963. It was equally obvious that the two robbers fled to California in petitioner's airplane on March 8 primarily to escape apprehension for the Bon Marche robbery. Moreover, defense counsel expressed his willingness to stand on the government's stipulation and asked no further questions after the stipulation was made.

Thus, while the fact that the Bon Marche robbery had occurred was concededly relevant in establishing Young's motive in fleeing to Brazil on March 28, peti-

[4] The trial court suggested that counsel could still inquire generally whether one of the purposes for the March 8, 1963, flight was to avoid arrest for a crime committed during that period (R. VI, 721–722). Counsel responded that "I am satisfied to have this stipulation made and let the record stand as it now stands" (R. VI, 721).

tioner was not remotely hindered in establishing that fact by the witnesses' claim of privilege. The instant case, therefore, does not in any sense present that "clear abuse of discretion" resulting in "obvious prejudice" which would warrant interference by a reviewing court with regard to limitations on cross-examination. See *Coil* v. *United States,* 343 F. 2d 573, 578 (C.A. 8); *United States* v. *Smith,* 342 F. 2d 525 (C.A. 4), certiorari denied, 381 U.S. 913. The cases cited by petitioner (Pet. 13) are not remotely comparable on their facts and present no conflict with the instant case.[5]

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[5] Petitioner also appears to urge (Pet. 12) that he was impeded in his recross-examination of Young with regard to a statement previously signed by Young relating to Young's motives for the flight to Brazil. On recross-examination, Young testified that the Kirkland robbery was a purpose but not the primary purpose for his movement from Washington to Portland, Oregon, in January and for his flight to Brazil in March (R. VI, 768). At this point, defense counsel sought to impeach Young with the signed statement which had been made before trial. This statement, which was read to the witness in front of the jury, contained admissions of complicity in the Portland and Bon Marche robberies. The statement pointed to these two robberies as the motivations for Young's interstate and foreign movements, and disclaimed the Kirkland robbery as a factor motivating these flights (R. VI, 771–776). When examined on the statement, Young at various points admitted signing it and admitted that he made the admissions therein concerning the Kirkland and Portland crimes (R. VI, 771–775, 780). At other points, however, he refused to admit, on grounds of self-incrimination, that the whole statement was his or that he made the admission that he had committed the Bon Marche robbery, and he asserted that the statement was inaccurate with regard to whether the Kirkland robbery had motivated his flight. (R. VI, 772–775). Young's refusal to answer some of the questions relating to the statement thus did not constitute a hindrance to petitioner's examination of Young's motives for the flight to Brazil.

2. Section 1073 of Title 18 makes it a criminal offense for a person to move in interstate or foreign commerce with the intent to avoid a felony prosecution under the laws of the State from which he flees. Petitioner argues that he was charged in count III only with aiding and abetting Young's flight from *California* to Brazil, whereas Young was avoiding a prosecution under the law of *Washington*. Thus, petitioner argues that he did not aid Young in fleeing from the State of potential prosecution, as the statute requires (Pet. 19–23).

The court of appeals, however, properly concluded that Young's travel from California to Brazil constituted flight from Washington within the meaning of the statute, even though Young tarried in California after he left Washington. Flight from a given place remains such, even though it takes place in several stages or is interrupted. Thus, Young's physical movement from California to Brazil was part of his flight from Washington, designed to avoid Washington's ability to apprehend and gain custody. Any other construction of Section 1073 would artifically deprive the statute of its intended application in broadly aiding the apprehension of fugitives from State justice.[6]

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[6] The legislative history characterized the provision as "making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution." H. Rep. No. 1458, 73d Cong., 2d Sess., p. 1. The purpose was to give federal aid to States in solution of offenses involving "roving criminals." Congress concluded that "[t]he ability of Federal officers to follow a criminal from one State to any other State or States, as provided in the above bill, should furnish the desired relief from this class of law evaders." *Id.* at 1–2.

Congress enacted a similar provision in the Civil Rights Act of 1960 by making it a crime to move in interstate commerce

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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with the intent to avoid prosecution under the laws of the place from which a person flees for willfully damaging any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution. 18 U.S.C. 1074. As with the earlier statute, Congress was mainly interested in alleviating the peculiar difficulties interjected into law enforcement by interstate or foreign travel. H. Rep. No. 956, 86th Cong., 1st Sess., pp. 5–6.

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